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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
Petitioner,

v.

CHARLES F. BRANNAN, as Secretary of Agriculture of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Dairymen's League Co-operative Association, Inc. for a writ of certiorari, to review a judgment of the Court of Appeals for the Second Circuit, respectfully shows:

Summary Statement of Matter Involved

The petitioner complains of the judgment of the Court of Appeals for the Second Circuit filed February 1, 1949, which affirms a judgment of the United States District Court for the Northern District of New York made after a hearing upon testimony and upon stipulated facts. The

action was one authorized under Section 8c(15) (B) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 608c (15)(B)). The judgment of the District Court denied and dismissed petitioner's complaint which sought a refund of moneys in excess of $145,000 paid under protest to the Market Administrator of the New York Metropolitan Milk Marketing Area. The moneys were demanded of and paid by the petitioner under protest as a result of the action of the Market Administrator in re-classifying certain sales of cream in Northern New Jersey.

Following enactment of the Agricultural and Marketing Agreement Act of 1937 (7 U. S. C. § 601; 50 Stat. 246), the Secretary of Agriculture in May, 1938, held hearings on a proposed regulation (R. 134, 132) and thereafter and on August 5, 1938, issued a regulation known as Order No. 27, effective September 1, 1938 (R. 118), relating to the handling of milk received for sale in the New York Metropolitan Milk Marketing Area (7 C. F. R., 1938, Supp., § 927.1-927.11a, (R. 79-105)).

Creation of Special Cream Market

Order No. 27 provided for a classified pricing system in the sale of milk and was held valid as an effective arrangement for disposition of the normal milk surplus in the New York area, in *United States* v. *Rock Royal,* 307 U. S. 533, 549 (1929).

The order recognized a primary market for the sale of fluid milk in the City of New York and the counties of Nassau, Suffolk and Westchester which it called the New York Metropolitan Milk Marketing Area, to be officially referred to as the "Marketing Area" (Article I, Section 1, paragraph 3 (R. 82); Article III, Section 2, paragraph 1 (R. 86)), which is not in question in this case. It also recognized a special cream market, not expressly so named or identified in the Order No. 27, nor until a later amend-

ment (7 C. F. R., 1943 Supp. § 927.1 (h)). The special cream market in Order No. 27 as first promulgated, effective September 1, 1938, was a market for the sale of surplus in the form of cream of two classes, Class II-A (unpriced), consisting of counties outside the "Marketing Area" (Article IV, Section 1, (R. 88, 11)), and a lower priced class, Class III-D, consisting of counties "outside the State of New York and outside any county in other states in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the "Marketing Area" (Article III, Section 2, paragraph 7 (R. 87, 11)).

The sales in controversy in this case were cream sales reported by the petitioner in Class III-D which the Market Administrator re-classified to II-A (unpriced) (R. 11, 114). For the purposes of this action, the petitioner divided these re-classified sales into four claims (R. 7-10).

Claim 1 relates to shipments of cream from country plants of the League to a purchaser, delivery being made at the railroad platform in Newark, New Jersey, in Essex County, an unapproved county.

Claim 2 relates to shipments of cream from its country plants to the League's plant at Newark, New Jersey, in Essex County, an unapproved county, the sales being made from the plant or on route therefrom.

Claims 3 and 4 relate to cream made at country plants of Borden's of milk received from the League's producers, and from there shipped to the Borden plant at Newark, New Jersey, in Essex County, an unapproved county and later transported for distribution in an approved county; also of milk shipped from country plants of the League and Borden's to the Newark Borden plant, then made into cream and commingled with the cream shipped from the country plants.

During a portion of the time the New Jersey plant of Borden Company was operated by a division of The Borden Company and during the balance of the period by a separate corporation, a subsidiary of The Borden Company.

Also during the months of March and April, 1940, shipments of cream were made from the Borden Oxford country plant to another plant where it was pasteurized and packaged and transported for distribution to the distribution depots of The Borden Company in Montclair and Newark both in unapproved counties.

In general, petitioner claimed III-D status for this milk because it was actually sold or delivered in an unapproved county in New Jersey. The Market Administrator claimed II-A (unpriced) status for these sales because the cream sold was later removed to an approved county in New Jersey or passed through an approved county in reaching destination in an unapproved county.

The Official Interpretations of the Order

Questions arose as to the operations of these provisions of Order No. 27 classifying cream for sale almost immediately after its issuance. Particularly in question were the provisions of Article III, Section 2, paragraph 7, which stated that III-D cream was cream delivered to a purchaser not a handler outside of New York and outside an approved county. These questions arising as to the interpretation and administrative application to be given to the words, "not a handler," were as follows: (a) when the operator of a plant is or is not a handler; (b) whether shipment of cream from a country plant to a plant in an unapproved county would automatically take a III-D classification.

The order applied only to handlers (preamble 3 (R. 81)) and handlers were defined as persons engaged in the han-

dling of milk at approved plants (Article I, Section 1, paragraph 6 (R. 83)). The phrase "not a handler" was not expressly defined in the Act or in Order No. 27, but was impliedly defined in the definition of "Handler" in Article I, Section 1, paragraph 6, last sentence, reading, "This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area." The plants in the unapproved counties involved in this case neither received milk from producers nor sold milk in the marketing area. The word "delivered" was not expressly defined in the Act.

A further question arose at the same time as to the administrative application of the provision found in Article III, Section 1 (R. 85, 86) stating that milk shall be classified in accordance with its utilization at or movement from the plant where received from producers provided that if the milk is moved as cream from any plant outside of the "Marketing Area" to any second plant, classification may be in accordance with its utilization at such second plant. The principal question here arising as to the meaning and application of the word "utilization" was: (c) could a second plant for classification purposes be a second cream plant, or did utilization mean a change in form such that if the milk were changed into cream at the first plant, it could not be utilized again by sale as cream at the second plant?

A conference as to the interpretation or application of the provision of the order was had on November 26, 1938, between the Market Administrator and his aides and representatives of the industry. A statement of points involved was submitted by the Administrator to representatives of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and to representatives of the Dairy Division of the Department of Agriculture at Washington, D. C., for the very purpose

of determining the administrative interpretation or application of the III-D classification (R. 53, 59, 129).

As a result of these official conferences, there was issued and publicly announced to the industry, including petitioner at a meeting at Syracuse, New York, on December 5, 1938, a statement as to several rulings of the Administrator as to the administrative application of the order particularly relating to the cream classification provisions discussed at the conference (R. 53-56, 59, 77). The record shows that a further statement and public announcement was made by the Administrator on the same date or shortly thereafter and in December, 1938, to the representatives of the industry containing answers to the question of the industry as to applications of the provisions of the order which were put to the Administrator by the industry on December 5, 1938 (R. 130, 131).

These statements of the Market Administrator, in general and as to the questions referred to above arising under Article III, Section 2, paragraph 7, were: (a) that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131); and (b) that cream shipped to an unapproved county automatically took a III-D classification (R. 55). As to the question referred to above arising under Article III, Section 1, the statement of the Market Administrator was; (c) that classification may be in accordance with the second cream plant which may be the third plant (R. 53, 77).

These interpretations were not only proper but necessary for the purpose of indicating to the industry how the order would be applied in case of certain movements and uses as to which the words of the order were not entirely specific. Such interpretations were not contrary to the provisions of the order.

The order was suspended January 31, 1939 to July 1, 1939, pending the test of its validity in the *Rock Royal*

case *supra,* and no question arises as to the construction and application of the order during that time, except that it extended by five months the time in which the industry was allowed to go on relying upon the interpretations.

In accordance with the official interpretations made in December, 1938, the League reported to the Market Administrator sales of surplus milk sold as cream outside the "Marketing Area" during the period in question, September 1, 1938 to January 31, 1939, and July 1, 1939 to April 30, 1940, in the III-D classification. All of such sales were made in Northern New Jersey (R. 63) and none of the cream or milk sold as cream involved in this action reached destination in the New York Milk Marketing Area defined as the City of New York and counties of Nassau, Suffolk and Westchester (R. 63, 11, 12, 82), although some of the cream so sold was shown to have reached destination in approved counties and some of it passed through approved counties in reaching destination in unapproved counties (see Charts R. 196-199).

On October 20, 1939, the first audit charge or billing was made against the League by the auditors of the Market Administrator in the sum of $48,575.78 as a result of their action in re-classifying the sale of cream above described for the period of September, 1938, to January, 1939 (R. 51, 63). No reason for the audit charges or billing was shown. Further re-classification audits were made from time to time bringing the total of the sum so demanded for the entire period in question to $157,060.62. All such sums were paid by the League under protest (R. 64).

As a result of this re-classification and demand and payment under protest of such sums, the League was refused credit for the cooperative payments made on the re-classified milk (R. 63, 115), lost the benefit of the low price III-D classification in its pooling account with the Market Administrator, and was required to pay adminis-

trative assessments prescribed on the reclassified Class II-A (unpriced) milk (R. 63, 115).

Other than the re-classification audit billings on October 20, 1939, and thereafter, there were no indications whatever of a change in the III-D classification as officially interpreted in December, 1938. No public announcements or statements were made to the industry of any change in such interpretations or administrative applications of the order previously given.

No industry conferences were held on the changes as they had been held on the December, 1938, rulings.

A memorandum by Mr. S. A. Aldrich, an auditor in the Market Administrator's office, stated to have been issued February 14, 1940, to members of his staff only, stating his reasons for the re-classification was not publicly announced to the industry nor was it brought to the attention of the League until the time of trial (R. 130). The Aldrich memorandum expressed a new theory of classification without citation of reason or law or ruling in the name of the Secretary or of the Market Administrator, to the effect that if cream moves from an unapproved county to an approved county, then it is II-A unpriced (R. 130, 131, 55, 53). It did not specifically refer to or overrule the previous publicly announced official interpretations of December, 1938, particularly the one (R. 131) that "when a plant is not approved for the marketing area the dealer is not considered a handler at that plant."

Stipulation of Facts between Counsel at Pre-hearing Conference

On March 15, 1940, and pursuant to the remedy provided by Section 8c (15) (A) of the AMAA (7 U. S. C. 608c (15) (A)), the League filed a petition with the Secretary of Agriculture for a refund of sums paid under protest.

A stipulation of facts was entered into thereafter between counsel for the League and counsel for the War Food Administrator at a pre-hearing conference between presiding officer Gifford on January 24, 1944 (R. 61-78). This stipulation was read into the record by the presiding officer at the pre-hearing conference pursuant to his prescribed duties (4 C. F. R. 1943 Cum. Supp. Section 900.58) to shorten, simplify and expedite the issues. The functions of the War Food Administrator with respect to this matter were later exercised by the Secretary of Agriculture (R. 117). A motion to show only enough facts to secure a ruling of the issues was made before the presiding officer and was referred to the judicial officer Flavin and granted by him January 24, 1944 (R. 116). The presiding officer made no objection whatever as to the provisions of the stipulation.

The stipulation contained statements as to the application to the questions in this case of the officially approved and publicly announced official interpretations made in December, 1938. As to the question (a) under what circumstances an operator is or is not a handler with respect to an unapproved plant, it was stipulated "the delivery of the cream shipped to such plant was not a receipt or purchase by a handler" (R. 68); as to the question (b) of whether shipments of cream to an unapproved county automatically takes a III-D classification, it was stipulated that the Borden plant at Newark "was not approved by any health authority for the receiving or shipping of milk to the marketing area and the operator with respect to such plant was not a handler, and cream shipped to such plant would be in the first instance delivered to a purchaser in an unapproved county who was not a handler with respect to such plant" (R. 72); as to the question (c) whether the second plant for classification purposes may be a second cream plant, it was stipulated that "The words 'second plant' in the second proviso in Section 1, of

Article III to said order means 'second cream plant.' This interpretation was made in December, 1938, and retroactive to September, 1938" (R. 77).

The presiding officer filed his report recommending a dismissal of the petition on December 2, 1944 (R. 117, 13).

The oral argument on exceptions to the presiding officer's report was then held before judicial officer Flavin on July 18, and 20, 1945 (R. 117, 12, 57). Then and for the first time the judicial officer, in speaking of the stipulation which had been cited to him stated (R. 57): "I do not feel necessarily bound by the stipulations as to what I consider either conclusions of fact or legal conclusions."

A colloquy between the judicial officer and counsel for both the League and the War Food Administrator then followed (R. 58-60). Both counsel for the League and counsel for the War Food Administrator assured the judicial officer that the stipulation followed the historical background in complying with the facts in the case and the official interpretation as to "handler" (R. 58, 59). The judicial officer inquired and was assured by counsel for both parties that the statements so made had been made with reference to the question of III-D classification (R. 58, 59). The judicial officer appeared convinced on the point. Counsel requested leave to file briefs if he had doubt upon it. He never asked for briefs. Counsel pointed out that there was no need of filing briefs if the judicial officer should find no doubt (R. 60).

The judicial officer, upon filing his decision on March 6, 1946 (R. 158) which dismissed the petition for the most part, conceded in his statement of conclusions that both the petitioner and the Department of Agriculture relied upon the official interpretation as to the word "handler" (R. 144, 145, 130), and that the terms of the order were not clear and left room for differences of opinion on interpretation and application (R. 158). He, nevertheless, re-

fused to follow the application of the official interpretations as to the III-D deliveries at Newark, an unapproved County, upon the ground that the stipulations were of legal conclusions (R. 146).

No notice following the colloquy with counsel and prior to this decision of the judicial officer was given to the League as to the judicial officer's decision on this point. If the case had been remanded in accordance with the spirit of due process, the League believes it could have proved conclusively that the December, 1938 interpretations were authorized by the Secretary of Agriculture and were made by the responsible officials of the Department of Agriculture who drafted the order and who were charged with the duty of supervising administration of the order. The League believes that it could remove any doubt as to the record expressed by the Court of Appeals (R. 194), and show that the interpretation that a "handler" is not a handler at an unapproved plant (R. 130) has been continuously and universally applied.

Decisions of the Lower Courts

The decision of the judicial officer was affirmed by the District Court for the Northern District of New York upon review proceedings taken pursuant to the special provisions contained in the Agricultural Marketing Agreement Act (7 U. S. C. A., Section 608c (15) (B)) and was further affirmed upon appeal to the Court of Appeals for the Second Circuit. Different reasons were cited for the affirmance in each Court's opinion.

The Judicial Officer. In this statement of findings and conclusions, the judicial officer held:

As to the official interpretations. The judicial officer referred to them as making the III-D definition redundant,

that they were contrary to the administrative practice that cream sold in an unapproved county was not entitled to III-D classification if it moved on to an approved county, citing the Aldrich memorandum of February 14, 1940, without explanation of the lapse of time between that memorandum and the official interpretations of December, 1938; that the official interpretations were merely concessions to handlers (R. 147); and that a III-D classification was possible only at the first cream plant, because a change in form was contemplated by the use of the word "utilization" (R. 144, 145).

As to the stipulation. The judicial officer held it was a stipulation of legal conclusions not binding on the Secretary. He did not comment on the understanding expressed in the colloquy with counsel (R. 57-60), that before decision on the point, the judicial officer would receive briefs on the subject nor why he did not follow that understanding (R. 146).

The District Court. As to the official interpretations. The Court misapprehended and misstated the official interpretations by adding a qualifying clause not present in the original. The Court held that the cream should remain in an unapproved county (R. 173), and that the classification at the first plant was justified (R. 170).

As to the stipulation. It was a stipulation of legal effect of facts not binding on the Secretary and not binding on the Court (R. 172, 173), without comment on the lack of opportunity of counsel to present a case on the points as to which the stipulation had not been accepted.

The Court of Appeals. As to the interpretations. The decision of the Court of Appeals was largely on a new theory that the words "not a handler" in the Class III-D definition meant not a handler anywhere so that a handler having a plant in an approved county could not be "not a

handler" within the definition of III-D (R. 177). Until this decision of the Court of Appeals, the official interpretation (a) that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131) had been left unchanged. The Court held that delivery under III-D classification was not effective until arrival at a plant from whence distributed. The Court further held that the "second thought of the Administrator was better than his first" and that the Court was not bound to accept his early ruling, apparently referring to interpretation (b) that cream received at an unapproved plant automatically takes a III-D classification (R. 55); that the administrative ruling issued only a few months after the promulgation of the regulation was "tentative,"* or if not, should have been (R. 193). The Court did not comment on the fact that the interpretations contained no statement that they were "tentative,"* or as to the lapse of time or things done between the change of rulings, except that upon rehearing the Court in a *per curiam* opinion (R. 210) stated:

> "The plaintiff's petition for rehearing is denied; but the judgment entered upon our mandate is not to preclude the defendant from reconsidering the plaintiff's petition for refund if he be disposed to do so because of any matters stated in the plaintiff's petition for rehearing in this court."**

The Court of Appeals left undecided the interpretation (c) mentioned above that classification may be in accordance with the second cream plant (R. 77) which had not

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* Apparently meaning not binding.

** Pursuant to this direction the League renewed negotiations with the Department of Agriculture for a settlement of its claims and was advised by telegram signed by John I. Thompson, Asst. Administrator for Marketing, dated May 20, 1949, that "Department can find no grounds for settlement of claim. * * *"

been changed until the decision of the Judicial Officer, although for purposes of argument, assumed that the petitioner had the option of classifying either at the first or at the second plant (R. 186).

As to the stipulation. The stipulation attempted to put a gloss on the order and the Judicial Officer was right in not accepting it. The petitioner was not misled in presenting the facts on the stipulation and it asked only to present briefs. The Court did not comment on the fact that the stipulation merely incorporated the interpretations nor on the fact that the argument before the Judicial Officer was not a hearing *de novo*.

Basis of the Court's Jurisdiction

The judgment of the Court of Appeals was entered on February 1, 1949 (R. 200).

A petition for rehearing was entertained by the Court of Appeals and denied on March 26, 1949 (R. 211).

The time to file this petition for certiorari was extended to July 20, 1949, by order of Mr. Justice Jackson dated May 27, 1949 (R. 212).

Authority for judicial review of the opinion of the judicial officer acting for the Secretary of Agriculture is contained in 7 U. S. C. § 608 (c) (15) (B).

The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254 (1).

Questions Presented

1. (a) Whether interpretations of an administrative regulation, the application of the provisions of which regulation are not clear, which interpretations have been made after a formal conference with the industry and approved by officials directly responsible for the administration of

such regulation and publicly announced by the Market Administrator, the official designated to administer such regulation, are binding on the Secretary of Agriculture during such time as no contrary or different interpretation was made known to the persons proceeding according to the terms of such interpretations publicly announced.

(b) Whether such interpretations of such an administrative regulation in the early stages of its administration, are "tentative" in nature and subject to change retroactively, and without notice although not expressly declared so to be in the interpretations themselves.

(c) Whether such formal administrative interpretations may be changed retroactively and without notice a year and a half later by informal action and detailed administration by subordinate auditors.

(d) Whether transactions made in accordance with formal interpretations of an administrative application of a regulation and in accordance with such interpretations by the private party and the execution of a stipulation incorporating such interpretations by counsel for both the Government and the private party, estops the Government from exacting the additional payments from the League in this case.

2. (a) Whether the judicial officer properly conducted the proceeding before him and the adjudication on the record in this case as previously taken before the presiding officer.

(b) Whether after the record in an administrative hearing before a presiding officer has been closed and the matter subsequently proceeds for adjudication on that record before a judicial officer, a different person than the presiding officer, who impliedly agrees to receive briefs with respect to a stipulation of facts between counsel if he should be in doubt of its binding effect, the judicial officer may then decide the issue refusing to follow the stipula-

tion without notifying counsel or giving reason therefore, and without sending the case back to the presiding officer to receive evidence, if desired, by counsel and without request on part of counsel to be relieved of the stipulation.

3. (a) Whether there is sufficient question as to the correctness of the construction and application of the provisions of Order No. 27 to the sales in controversy to warrant remanding the matter to the Department of Agriculture for further proceedings.

(b) Whether Article III, Section 1 of Order No. 27 authorized classification of milk on the basis of utilization or movement beyond the second cream plant or after sale by the handler.

(c) Whether the Class III-D definition in Order No. 27, in referring to delivery of cream to a purchaser, not a handler, is correctly construed as including the transportation of the cream by the purchaser to his plant after transfer of possession and title to the purchaser.

(d) Whether the phrase "not a handler" in the Class III-D definition of Order No. 27 is correctly construed as excluding the operator of an unapproved plant who is also the operator of an approved plant elsewhere.

Reasons Relied Upon for the Allowance of the Writ

The Interpretations. The respondent attempted to change the construction of formal administrative interpretations by informal, belated and retroactive administrative application. We believe the propriety of this practice to be an important question of Federal Law which has not been, but should be decided by this Court. The holding of the Court of Appeals for the Second Circuit in this respect, is contrary to that of the Court of Appeals for the Ninth Circuit.

The subsequent changes neither formally considered at a meeting of the industry on the subject nor formally announced, as were the previous interpretations, and even entirely devoid of any evidence of official approval appearing in the record, even by the Market Administrator, nevertheless, were given paramount authority by the decisions of the judicial officer and the lower Courts in this case and even given a retroactive effect. These decisions in this respect, are contrary to law, contrary to due process and contrary to the Marketing Agreement Act of 1937, and were a taking of private property without just compensation.

The Court of Appeals in stating that the "second thought of the Administrator was better than his first," clearly shows the Court's misapprehension of the nature of the administrative action in this case taken in December, 1938. That "first thought" of the Market Administrator was not merely a thought of the Administrator, but rather a solemn public announcement of an administrative interpretation and application of doubtful points of wide scope and great importance in the industry and made after a conference between the industry and responsible Government officials. The "second thought", moreover, was not that of the Administrator but of a subordinate.

The decision of the Court of appeals upholding the changes in administrative application of a regulation of doubtful clarity made retroactive for more than a year and without notice to the persons proceeding according to the interpretations of the order previously and publicly announced, is contrary to the applicable decisions of this Court and is contrary to the decisions of other Circuits.

The change in the official interpretations of December, 1938, not made known by the Market Administrator, but only by a mere billing of charges, created heavy liabilities arising out of completed sales made during the period involved herein and especially all those made before October

20, 1939, and which liabilities did not exist at the time the transactions took place.

The retroactive change in the official interpretatons and the consequent extension of the liability of milk handlers for the completed sales of milk in question, made the milk sold and paid for milk of a different class and of a considerably higher priced class, then that actually sold and paid for, and in effect made new agreements between the petitioner and its customers and imposed upon the petitioner a liability which it could not have foreseen and to which it did not assent.

Order No. 27 conferred no right upon the Administrator, under the guise of re-classification, retroactively to change an official interpretation. Neither did the Agricultural Marketing Agreement Act authorize the Secretary to issue retroactive regulations.

The decision that administrative interpretations officially made and announced shortly after the promulgation of a regulation the provisions of which are not clear, are "tentative" in nature although not expressly stated to be so at the time of their issuance, so that later interpretations retroactive in nature are authorized, is a decision contrary to law and of the greatest importance to the entire industry.

These interpretations issued substantially contemporaneously with Order No. 27 had the force of law. They were discussed at a public meeting of the industry and approved by the Federal and State officers in charge of the promulgation and administration of the order. The failure to enforce these interpretations of December, 1938, is contrary to the applicable decisions of this Court.

The Stipulation. The decision that an administrative judicial officer in his conduct of a hearing upon a record taken before another official as presiding officer, may de-

prive the petitioner of a substantial right by impliedly agreeing to receive briefs before deciding whether a stipulation of facts between counsel is binding, and then arbitrarily proceed to decide the point without notice to counsel or sending the case back to the hearing officer to take proof of facts stipulated, is a decision on a point which has not been, but should be decided by this Court and is also contrary to the applicable decisions of this Court.

Construction of the Order. The decision of the Court of Appeals for the Second Circuit that the word "delivered" as used in Article III, Section 1, paragraph 7, of Order No. 27, is to be construed as including the transportation of milk after transfer of possession from a handler to a plant of a purchaser, is contrary to the decisions of this Court and the Courts of Appeals of other Circuits.

The decision of the Court of Appeals in this case that the classification and consequent pricing of sales of milk by the petitioner as a handler under the terms of Order No. 27 can be based upon operations of a purchaser from the handler subsequent to such sale is in conflict with the holding of the Court of Appeals for the Seventh Circuit.

The decision that an operator of an unapproved plant in one county where the cream was sold, who also operated an approved plant in another county, was not within the Class III-D description "not a handler" because of the operation of such other approved plant, is a decision contrary to the terms of the order and to the applicable decisions of this Court.

The decision of the Court of Appeals, in effect that classification of milk can be based on movement or utilization beyond the second cream plant and after sale by the handler, is contrary to the express terms of Section 1 of Article III of the Order.

Importance of this Application. The questions presented in this petition for certiorari are questions of federal law and are all of vital importance to all persons affected by the administration of orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, of which about thirty relate to milk control. The New York Order No. 27 alone involves a distribution value of about nine hundred thousand dollars per day.

The great part of the work of the milk marketing industry is done under administrative supervision and control. Orders and hearings and amendments and interpretations are matters of daily occurrence. The decision of the Court of Appeals on the questions of administrative practice, raised by the practices resorted to in this case, has brought confusion into a vital part of the business, and the subject and the industry is in need of a clarifying decision by this Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment in the United States Court of Appeals for the Second Circuit should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,

Petitioner,

v.

CHARLES F. BRANNAN, as Secretary of Agriculture of the United States,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the Court of Appeals for the Second Circuit is reported in 173 F. 2d 57, and is printed in the record herein at pages 182-199. A *per curiam* opinion of the Court of Appeals rendered upon petition for reargument is printed in the record herein at page 210.

The opinion of the District Court for the Northern District of New York is printed in the record herein at pages 159-174.

The preliminary statement, findings of fact and conclusions of law of the judicial officer is reported in 5 A. D. 143 and is printed in the record herein at pages 114-158.

Specification of Errors

The Court of Appeals for the Second Circuit erred in making the following rulings:

(1) "As an administrative interpretation, the plaintiff invokes another 'memorandum' which Harmon issued in December, 1938, in which he ruled that 'when a plant is not approved for the marketing area the dealer is not considered a handler at that plant.' This was issued only a few months after the Regulation itself was promulgated, and at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been" (R. 193).

(2) "We are satisfied that the second thought of the Administrator was better than his first; and we do not feel bound to accept the early ruling" (R. 193).

(3) "It is true that in cases of doubtful interpretation, long usage in reliance upon an administrative interpretation often counts for much. We need not say how far we should feel bound by the interpretation if the plaintiff had proved that it did conduct its business in reliance upon the 'memorandum' during the period in question" (R. 194).

(4) "Apparently, the conclusiveness of this agreed definition of the word, 'handler,' was first questioned by the 'judicial officer' at a hearing on July 20, 1945. He at that time 'warned' both parties that he might not feel bound by 'legal conclusions as to whether a person is a handler.' A discussion followed but all that we can find is a request by the plaintiff to be allowed 'to submit briefs on that

point,' if the 'judicial officer' decided not to accept the stipulation. Although the plaintiff complains that no leave was ever given to file such a brief, we cannot see, in view of the opportunity for argument afforded both in the district court and here, that this is grievance to be considered" (R. 192).

(5) "The 'judicial officer' was entirely right in not accepting the stipulation as final. It attempted to put a gloss upon the Regulation and the Regulation had the force of law" (R. 192).

(6) "The plaintiff invokes a 'memorandum' of Harmon, the Administrator at the time, made on December 8, 1938, which declared that 'when milk is diverted from a strictly fluid receiving station to a separating station, and from there on to a manufacturing plant, the manufacturing plant * * * is the second plant where the product moved as cream.' Assuming this to be a proper interpretation, it does not apply here, because the Paterson 'plant' was not a 'manufacturing plant,' but only a distributing plant. Part 'A' of Claims Three and Four was, therefore, properly dismissed" (R. 191).

(7) "Since the Jansen Company had a 'plant' in an 'approved county,' the cream delivered to it at its Bergen County 'plant' was delivered to a 'handler,' and was not within III-D" (R. 189).

(8) "After October 1, 1939, even though we consider the transfer as delivery to a purchaser, the cream was nevertheless not within III-D because the Borden Company which owned the Newark 'plant,' was a 'handler' by virtue of its ownership of other 'plants'" (R. 191).

(9) "All we need hold as to Claim One is that when a 'purchaser' receives cream in an 'unapproved county' and

takes it at once to a 'plant' in an 'approved county,' his status as 'handler' of that milk is to be determined by the location of that 'plant' " (R. 187).

(10) "The cream sold to the dealers and sub-dealers from the Newark 'plant' was in part delivered to them in Newark and in part 'on routes' or by express. The only remaining question as to these is whether they were 'handlers'; but in view of what we have said as to 'delivery' this is not important. So far as appears, all had their place of business in 'an approved county,' and the 'delivery' was in (fol. 191) that county, regardless of whether they took possession at the plaintiff's platform in Newark, or received the cream where they did business. Claim Two was properly dismissed" (R. 189).

(11) "The plaintiff does indeed suggest, but only in an indirect way, that, if construed as we are construing it, the Regulation is invalid. Plainly, we are in no position to decide that question. The Regulation was the result of long investigation and deliberation and the evidence on which it was based is not before us" (R. 194).

(12) "The question is whether this cream was properly classified under subdivision (b) of § 927.4 as II-A, or should have been classified as III-D" (R. 185).

ARGUMENT

POINT I

The question whether formal administrative interpretations of a milk marketing order may be changed retroactively by informal action of subordinates of the Market Administrator has not been but should be decided by this court, and the decision of the Court of Appeals permitting such practice is contrary to the applicable decisions of this court and of other circuits.

The propriety of the administrative action in this case upheld by the Court of Appeals of the Second Circuit in changing retroactively and by a mere billing of extra charges the previous formal and official interpretation of a regulation of doubtful clarity is contrary to the law of the 9th Circuit followed in the 8th Circuit and contrary to the applicable decisions of this Court.

F. Uri & Co. v. *Bowles*, 152 F. 2d 712 (C. C. A. 9, 1945);
Porter v. *Tanker Gas, Inc.*, 68 F. Supp. 103 (D. C. D. Minn. 4th Div., 1946).

The error of the Second Circuit seems to have been in the assumption that the change in the interpretation was of equal authority and formality with its making. The Court states:

> "We are satisfied that the second thought of the Administrator was better than his first" (R. 193).

On the contrary the interpretations in accordance with which the petitioner conducted its business were publicly announced to the industry, were issued after a formal conference with responsible representatives of the government

and industry, were approved by the officials directly responsible for the administration of the regulation and were issued as to provisions of doubtful clarity in the regulation and within a short time after the regulation was effective (R. 53, 59, 77, 131). The only attempt to change these interpretations prior to the decision of the Judicial Officer in 1946 (R. 114-158) was the billing of additional charges by the Market Administrator's auditors, the first such billing having been made on October 20, 1939. The billings were made as a result of reclassification of cream sales (R. 51, 63) and no reason was given for such reclassification as was contrary to the official interpretations. Even the memoranda of Mr. Aldrich, an auditor of the Market Administrator's office, issued February 14, 1940, was not brought to the attention of the League until the time of trial in 1945 and by government trial counsel (R. 130). The reclassifications were nothing but arbitrary actions of subordinates made without reason and without basis in law.

A further basis of the Circuit Court's error in approving the administrative action in this case appears in the ruling on interpretation (a), *supra,* p. 6, that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131). The Court ruled that this interpretation was "tentative, or, if it was not, ought to have been" (R. 193). The fact is that as to this interpretation the Market Administrator never did change his ruling. That a person to be "not a handler" must not be a handler anywhere was the notion solely of the Court of Appeals of the Second Circuit and was not announced until the decision of the Court in this case on February 1, 1949.

As will be seen from the context (R. 130-131, 55, 53, 77) none of these interpretations was issued in tentative form. The authority conferred on the Secretary was to issue orders and amendments and suspensions thereof containing locations at which delivery of milk, or any use

classification thereof is made to handlers (7 U. S. C. Sec. 608c(5)(A)(3), and is made provisional upon approval of two-thirds or three-fourths of the producers and subject to various adjustments (*Agricultural Marketing Agreement Act,* Secs. 8c(5)(B), 8c(8), 8c(16)(C) and 8c(17), (7 U. S. C. Secs. 608c(5)(B), 608c(8), 608c(16)(C) and 608c(17)). The authority of the Market Administrator was to administer the terms and provisions of the order Art. II, Sec. 3 (R. 84) which confers authority to make interpretations not inconsistent with the terms of the order (*Green Valley Creamery* v. *United States,* 108 F. 2d 342, 347 (C. C. A. 1, 1939)). But neither the act nor the order authorized or permitted a retroactive interpretation and application by way of a billing of extra charges on reclassification, creating heavy liabilities as to petitioner's past transactions and the payments exacted from the petitioner by the Market Administrator were illegally exacted according to the applicable decisions of this Court and other Circuits.

> *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 122 (1928);
> *Barron Coop. Creamery* v. *Wickard,* 140 F. 2d 485, 488, (C. C. A. 7, 1944).

As we have shown, the Market Administrator who announced the official interpretations (*supra,* p. 6) shortly after the promulgation of the order, never did announce any contrary rulings. It was only his subordinate who sought to change them, first by billings of additional charges on reclassification and later by an inter-office communication in the auditing department and signed only by the auditor and not by the Market Administrator. It is the first official interpretation issued shortly after the promulgation of the order that carries controlling weight in this Court.

> *White* v. *Winchester Country Club,* 315 U. S. 32, 41 (1942);

United States v. *American Trucking Ass'n,* 310 U. S. 534, 549 (1940);
Bowles v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413-414 (1945).

The decision of the Court of Appeals in approving the retroactive administrative action in this case is contrary to the applicable decisions of this Court which have consistently condemned retroactivity in administrative action.

Arizona Grocers Co. v. *A. T. & S. F. R. R.,* 284 U. S. 370, 389 (1932);
Miller v. *United States,* 294 U. S. 435, 439 (1935);
United States v. *McDaniels,* 7 Pet. 1, 15 (1833).

It should be axiomatic that, subordinates in the Market Administrator's office cannot overrule the Market Administrator and responsible officials in the Department of Agriculture. Water can not rise higher than its source.

POINT II

The arbitrary action of the judicial officer accepted by the Court of Appeals was a denial of a fair hearing to the petitioner and is contrary to the applicable decisions of this court.

At the pre-hearing conference, in order to obviate the taking of much testimony and to simplify and reduce the record, the parties agreed upon a stipulation which in part embodied the official administrative interpretations issued in December, 1938 (R. 61, 68, 72, 77). This stipulation was then read into the record by Presiding Officer Gifford. Over a year later, upon the argument before Judicial Officer Flavin and without any application or request to the relieved from the stipulation by either of the parties, the stipulation, as to the interpretations, was rejected by Judicial Officer Flavin (R. 146) without giving the petitioner

the opportunity to present in evidence the facts as to the interpretations involved in the stipulation.

The Judicial Officer had not been present at the hearing on the introduction of evidence and had only heard the argument on the evidence introduced at the hearing over a year after the hearing or trial of the action took place. The Judicial Officer first stated that he might not feel himself bound by the stipulation but then upon the circumstances being explained appeared to be convinced to the contrary and impliedly agreed to receive briefs if later on he should be in doubt (R. 59-60). The Judicial Officer gave no reason why he had not notified counsel before deciding the point of the validity of the stipulated interpretations after impliedly agreeing to receive briefs on the point. He acted "without adequate determining principle and without reason", as this Court stated in *United States* v. *Carmack,* 329 U. S. 230, 247 (1946).

The reason given by the Judicial Officer for not accepting the stipulations as to the interpretations was that the stipulated facts agreed upon by counsel were legal conclusions not binding upon him. In doing so he overlooked and ignored the fact that the stipulated facts objected to were official interpretations and an application of them to the facts of the case. This is shown by his reference to the interpretations as being merely "concessions to handlers" (R. 147).

In failing to accept the stipulated interpretations without giving the League an opportunity to file briefs on the subject or to take other action, such as to have the case sent back to the Presiding Officer for the taking of testimony upon the matter covered by the stipulation, and in failing to notify counsel before deciding the point as to the stipulated interpretations, the Judicial Officer arbitrarily deprived the petitioner of a full and fair hearing in accordance with law.

Morgan v. *United States,* 304 U. S. 1, 18 (1937);

Interstate Commerce Commission v. *Union Pacific*, 222 U. S. 541, 547 (1911);
Agricultural Marketing Agreement Act, Sec. 8c (15) (A), (7 U. S. C. 608c(15) (A)).

In the *Morgan* case, this Court stated, speaking through Mr. Chief Justice Hughes, and referring to a proceeding before the Secretary of Agriculture under the Packers and Stockyards Act:

> "* * * But a 'full hearing'—a fair and open hearing —requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> No such reasonable opportunity was accorded appellants * * *"

The Judicial Officer in deciding the issue of the stipulation without first notifying counsel not only laid the basis for his own error in failing to realize the official character of the interpretations but also provided the basis of the further error of the Court of Appeals in referring to the wrong interpretation quoted both in the opinion of the Judicial Officer (R. 129) and in the opinion of the Court of Appeals (R. 191).

This interpretation quoted both by the Judicial Officer and the Court of Appeals had nothing to do with the case and it had not been relied upon by the petitioner, and the

Court of Appeals in stating that the petitioner had relied upon it was mistaken in saying so. The interpretation relied upon by the plaintiff was that stated in paragraph 7 of the Harmon memorandum (R. 55). The Judicial Officer quoted only paragraph 1 of this memorandum (R. 129). The Court of Appeals repeated the error.

POINT III

The construction of the terms of Order No. 27 by the Court of Appeals was contrary to the terms of the order and contrary to the applicable decisions of this Court and other circuits.

Throughout this case we are concerned with the construction and application of an order or regulation and interpretations of the regulation rather than a statute. No question is made in this case that the order, as we construe it, does not fairly carry out the statute. However, we believe that in case of both the regulation and the statute the rule of construction in this case is the same. As the Court said in *Barron Co-operative Creamery* v. *Wickard,* 140 F. 2d 485, 488, C. C. A. 7, (1944) "administrative orders, like statutes, are not to be given strained and unnatural construction."

The Court of Appeals in effect rewrote the terms of Order No. 27 so as to give it a strained and unnatural construction by:

(1) Adding to the words "not a handler" in the III-D classification the words "and not a handler anywhere" (R. 189, 191);

(2) Adding to the words "not a handler" in the III-D classification the words "and not taken immediately to a plant in an approved county" (R. 187);

(3) By replacing the word "delivered" in the III-D classification with the words "transferred without subsequent transportation to or through an approved county" (R. 189);

contrary to the applicable decisions of this Court and other Circuits.

Addison v. *Holly Hill Fruit Products,* 322 U. S. 607, 617-18 (1944);
Miller v. *United States,* 294 U. S. 435, 439-40 (1935);
Iselin v. *United States,* 270 U. S. 245, 251 (1926);
Lindstrom v. *Comm'r. of Int. Rev.,* 149 F. 2d 344, 346 (C. C. A. 9, 1945);
Barron Coop. Creamery v. *Wickard,* 140 F. 2d 485, 488 (C. C. A. 7, 1944).

Although the Court of Appeals did not follow the decision of the Judicial Officer that the use of the word "utilization" in Article III, Section 1 of the order meant a change in form (R. 144, 145, 77), and assumed for purposes of argument that the petitioner had the option of classifying at either the first or second cream plant (R. 186), it seems clear, nevertheless, that the Court of Appeals fell into error in holding that the III-D classification could be based upon utilization at a third or even a fourth plant by transfer thereto in an approved county. In so doing, we submit that the Court of Appeals held directly contrary to the express terms of the second proviso clause in Article II, Section 1 of the order to the effect that classification of milk "at the first plant may be in accordance with its utilization at such second plant" (R. 86).

The word "delivered" in the Class III-D description was not defined in the order and therefore the plain and natural meaning as given to it by the common run of men should have been given to this word. Instead the Court of

Appeals in effect upheld the Judicial Officer who held (R. 140, footnote) that the word "delivered" was a word of many meanings and that actual transfer of possession and payment of the price could not control in interpreting the terms of the III-D provision. The decision of the Court of Appeals in this respect is contrary to the applicable decisions of this Court and of other Circuits.

Crane v. *Comm'r of Int. Rev.*, 331 U. S. 1, 6 (1947);
Addison v. *Holly Hill Fruit Products*, 322 U. S. 607; 617-618 (1944);
Anderson v. *Mercado*, 163 F. 2d 303 (C. C. A. 1, 1947);
Schreffler v. *Bowles*, 153 F. 2d 1, 3 (C. C. A. 10 (1946)).

The two principal plants involved here, the League's plant and Borden's plant at Newark, neither received milk from producers nor sold milk in the marketing area and came within the exception to the definition of "handler" stated in Article I, Sec. 1, Par. 6 (R. 86). None of the cream or milk reclassified in this case was sold in the marketing area nor did any of the milk or cream so reclassified find its way into the marketing area. If the League and the Borden Company are to be regarded as handlers at these Newark plants, then the decision is contrary to the statutory definition and to the facts as to the reclassified sales of milk sold at these plants.

Under the Class III-D description contained in the order, the handler at an unapproved plant was not required to follow the cream sold to see in what use classification it was finely disposed of or used, and the decision of the Court of Appeals in this case, that the III-D classification and consequent pricing of the sale of cream in an unapproved county may be based upon operations of the pur-

chaser subsequent to such sale, is contrary to the decision of the Court of Appeals of the 7th Circuit.

> *Barron Coop. Creamery* v. *Wickard*, 140 F. 2d 485, 488 (C. A. A. 7, 1944).

The Court of Appeals for the 7th Circuit in the *Barron* case considered a case arising under the Chicago Milk Marketing Order, and a reclassification by the Market Administrator of milk "disposed of" in Class III or butter which was ultimately used in making ice cream or Class II. The Court said at page 488:

> "Nothing in this order required the handler to look beyond his own disposition of the milk. Nothing in the order required him to pursue the milk and milk products to see in what use classification they were ultimately disposed of. If the handler disposed of the milk in the form of butter in good faith and not colorably to avoid this order, the classification was fixed by the disposition he made of the milk and not by the disposition or utilization some one else made at some subsequent time. The plaintiffs' sale of their butter to the Bowman Dairy Company was the disposition for which they were required to account. The resale of the butter in the form of ice cream by Bowman's vendee was not a disposition made by the plaintiffs for which they could be held accountable under the order."

The rules of construction of this Court and the other Circuits being contrary to the construction adopted and enforced by the Judicial Officer and the lower courts, it seems clear that the reclassifications and demands for additional payments made by the subordinates of the Market Administrator in this case without reason or basis in the law were unlawful, unauthorized under the terms

of the order, and were arbitrary, and that the judgments of the Judicial Officer and the lower courts were not in accordance with law.

CONCLUSION

The decision of the Judicial Officer and the judgment of the lower Court, as affirmed by the Court of Appeals, were not in accordance with law and should be reversed.

Respectfully submitted,

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